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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 391

STATE FARM FIRE AND CASUALTY COMPANY and GREYHOUND LINES, INC.,
Petitioners,

vs.

KATHERINE TASHIRE, EVA SMITH, HARRY SMITH, LILLIAN G. FISHER, BARBARA McGALLIAND, DORIS ROGERS, GAIL R. GREGG, RICHARD L. WALTON, heir of SUE WALTON, and DONALD WOOD,
Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Respondents suggest nothing in support of the jurisdictional conclusion of the court below to which a response should be made. They do, however, raise other questions not passed upon by that court: (1) Whether the action should be dismissed for lack of personal jurisdiction over the Canadian claimants (Resp Br 13-18); and (2) whether the personal injury actions against the insured should proceed in state courts, the interpleader injunction being limited to protecting the fund against execution (Resp Br 20-29).

I.

The action should not be dismissed for lack of personal jurisdiction over the Canadian claimants.

Respondents seek affirmance on the ground, ignored by the court below, that the district court lacked personal jurisdiction over the Canadian claimants, who were served by registered mail under Rule 4(e) and (i), Federal Rules of Civil Procedure.[1] While petitioners have suggested that the Court should remand the case to the Court of Appeals for determination of that question,[2] it can, of course, consider it.[3]

There are two questions: (1) Whether the Canadian claimants are indispensable parties to the action under amended Rule 19, Federal Rules of Civil Procedure; and (2) whether, if they are, service under Rule 4(e) and (i) was not an authorized and effective means of effectuating process issued for "all claimants" under 28 USC § 2361.[4]

a. The Canadian claimants are not indispensable parties to the action.

1. Indispensable parties whose absence requires

1. Respondents do not attack the sufficiency of proof of service on the Canadian claimants, which would not affect its validity in any case. Rule 4(g), Fed R Civ Proc.
2. Pet Br 42; *Polizzi v. Cowles Magazines*, (1953) 345 US 663 at 667.
3. *Langnes v. Green*, (1931) 282 US 531. We respectfully suggest that the Court, having accepted the case to resolve a conflict between the circuits and decide an important question of federal jurisdiction, should not leave those matters unresolved.
4. Material parts of Rules 4 and 19 are set forth in the Appendix, infra 16-19.

dismissal of the action were defined in *Shields v. Barrow*, (1854) 17 How (58 US) 130 at 193 as

> "* * * Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."[5]

Long before the 1966 amendments to Rule 19, it was established that the question in each case is controlled by practical considerations; the court will adjudicate the issues among the persons before it, provided this can be done effectively without prejudicing the rights of absent, though interested, persons.[6]

Under the 1966 amendment to Rule 19, effective July 1, 1966,[7] the standard is even more practical. A determination of indispensability can be made only upon consideration of all the circumstances, particularly the practical consequences of proceeding without the absent persons.

> "* * * The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him

5. See also *State of Washington v. United States*, (CCA 9 1936) 87 F2d 421 at 427-428.
6. *Bourdieu v. Pacific Oil Co.*, (1936) 299 US 65 at 70-71, reh den (1936) 299 US 622; *Waterman v. Canal-Louisiana Bank Co.*, (1909) 215 US 33 at 49; *Shaughnessy v. Pedreiro*, (1955) 349 US 48 at 54.
7. The amendment is applicable to this case by order of the Court of February 28, 1966. Moore, Rules Pamphlet (1966) p 1.

or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."[8]

2. Judged by these controlling standards, the Canadian claimants are not indispensable parties to the action. If jurisdiction is not secured over them, they will not be bound by any judgment in the case and their claims against Clark and his insurer will not be affected by it. Any determination by the district court that the American claimants are (or are not) entitled to share in the fund created by State Farm's deposit will not amount to an adverse determination of the Canadian claims, nor would such determination bind them if one were made.[9] *N.Y. Life Ins. Co. v. Dunlevy*, (1916) 241 US 518, relied on by respondents, held that the claim of an absent person to the surrender value of a life insurance policy was personal and could not be adjudicated without personal jurisdiction. It did not hold that the interpleader judgment was a nullity as to the claims of persons who were before the state court; nor did the

8. These "pragmatic considerations" have been "drawn from the experience revealed in the decided cases." Advisory Committee Notes, Moore, Rules Pamphlet (1966) pp 521-522.

9. See *Brown v. American Nat. Bank*, (CA 10 1952) 197 F2d 911 at 914.

Court suggest that the insurance company could recover money which it had paid under that judgment.

3. We recognize that in some circumstances, as where the stakeholder is sued by a claimant to the fund, absent claimants have been held to be indispensable.[10] In some cases, if the action is *in rem* the right of an absent person may be effectively impaired; if it is *in personam* there is a risk of double liability resulting from inconsistent decisions. These, however, are pragmatic, not conceptual considerations,[11] and under the standards of the new rule they are not controlling in an interpleader action brought by a liability insurer seeking relief against all claimants who can be served in the United States.

It is true that proceeding to judgment will not give the insurer the benefits of interpleader as to the Canadian claims. It will sustain a continuing obligation to defend them if they should be asserted and a risk of multiple liability if it should later be found to have proceeded in "bad faith". This, however, is a decision the insurer should be allowed to make. In many cases, after considering the number and value of the foreign

10. *U. S. v. Bank of New York Co.*, (1936) 296 US 463 at 480; *Williams v. Bankhead*, (1874) 19 Wall (86 US) 563 at 570-572.

11. One of the reasons for the 1966 amendment was to remove language in the original rule which

> "* * * directed attention to the technical or abstract character of the rights or obligations of the persons whose joinder was in question, and correspondingly distracted attention from the pragmatic considerations which should be controlling."
>
> Advisory Committee Notes, Moore, Rules Pamphlet (1966) p 519

claims and the other circumstances, it will be willing to forego the protection which a court might give a defendant resisting the claims of fewer than all of the claimants. It will assume these risks and still seek the protection of interpleader as to the majority of claimants who can be served.

4. The Canadian claims against State Farm are distinguishable from Mrs. Dunlevy's on another ground. For those claims are—and always have been—subject to prior exhaustion of the policy proceeds by settlement of other claims (Pet Br 28-29). Thus, the insurer's deposit of the policy limits into court is in fact a means of paying claims up to the policy limits, and nobody suggests that the Canadians are indispensable to that process. In *New England Mut. Life Ins. Co. v. Brandenburg*, (DC SD NY 1948) 8 FRD 151 at 154, Judge Knox stated:

> "* * * the courts are wary of the danger of permitting contradictory judicial orders being directed to a single fund, but are not so disturbed where the only possible inconsistency is that of two persons whose claims appear to be similar, one may ultimately recover and the other may not. Thus most frequently there must be a single fund or res involved before a court will rule that there are indispensable parties. * * *
>
> "Even where there is a single fund or res, the court will 'strain hard' to find interests to be separable so that an action need not be dismissed. * * *"

Permitting this action to continue among the parties before the Court will not foreclose any legal interest of the Canadian claimants or any claim they may have against Clark and his insurer.[12] The interpleader action may, of course, indirectly affect the Canadian claimants, for a court-administered distribution of the fund among successful American claimants will deprive them of the shares they might have received if they had appeared in the action. That risk, however, that the fund would be paid to others, is one they have always carried; they can avoid it by appearing and suffer no legal injury if they do not.

> "* * * An absent party may also be prejudiced by the parties' *acting in accordance* with a decree or judgment, as when a fund is distributed to creditors. But this prejudice does not result from the fact that the absentee is bound by the judgment, but because the practical value of a later suit by him may be impaired by the change of out-of-court circumstances. The prospect of such impairment is indeed a factor to be considered in determining who should be joined, *i.e.*, who are necessary parties. * * * But the sole fact of such impairment is not ground for refusing to proceed, any more than the fact that a debtor's payment of a judgment will impair his ability to pay others is ground for refusing to pro-

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12. There is, therefore, no need to enter the current controversy over the scope and effect of the 1966 amendment to Rule 19. See, generally, *Provident Tradesmens B. & T. Co. v. Lumbermens Mut. Cas. Co.*, (CA 3 1966) 365 F2d 802, pet cert pdg; Fink: *Indispensable Parties*, 74 Yale L J 403 (1965); Reed; *Compulsory Joinder of Parties*, 55 Mich L Rev 327, 483 (1957); Moore, Rules Pamphlet (1966) pp 524-526.

ceed with a creditor's suit."[13] (emphasis in the original)

5. Manifestly, permitting the action to proceed will not prejudice the American claimants, whose *pro rata* shares of the deposited policy limits will be increased by the absence of the Canadian claimants. It is of no concern to them that the insurer may subsequently be subjected to separate claims by the Canadians. *New England Mut. Life Ins. Co. v. Brandenburg*, supra, (DC SD NY 1948) 8 FRD 151 at 155; *Develpoments—Multiparty Litigation*, 71 Harv L Rev 874 at 881, 882 (1958). Nor will it prejudice the insured, whose coverage will have been extended as far as circumstances permit and who will be entitled to a defense of any claims which may subsequently be asserted by the Canadians.

6. If the district court cannot determine the rights of those who are before it for lack of jurisdiction over the Canadian claimants, all parties are denied the benefit of the Federal Interpleader Act. *Dunlevy* will continue to present insurers with the problem of the absent claimant. In this case, State Farm will be required to defend a multiplicity of actions and there will be an inequitable division of the fund, thereby frustrating important purposes of statutory interpleader. In the absence of compelling circumstances which are not

13. Hazard: *Indispensable Party*, 61 Col L Rev 1254 at 1288-1289, fn 183 (1961). See also: Note, 65 Harv L Rev 1050 at 1053 (1952).

present in this case, a determination that absent parties are indispensable should not be made where it will deprive the plaintiff of any effective remedy.[14]

b. Personal jurisdiction was secured over the Canadian claimants under Rule 4(e) and (i), Federal Rules of Civil Procedure.

1. Section 2361 of the Judicial Code (28 USC § 2361) provides that in an interpleader action under § 1335 the district court

> "* * * may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action * * *."

Respondents contend that this comprehensive grant of authority to issue process for all claimants is reduced and limited by the provision elsewhere in § 2361 that process shall be served by the United States marshals in districts where the claimants reside or are found.[15]

14. See Rule 19; *Stumpf v. Fidelity Gas Co.*, (CA 9 1961) 294 F2d 886 at 891-892; *Zwack v. Kraus Bros. & Co.*, (CA 2 1956) 237 F2d 255 at 259-260. Cases relied on by respondents are distinguishable on this ground. In *Republic of China v. American Exp. Co.*, (DC SD NY 1952) 108 F Supp 169 at 170 the court held that foreign service under § 1655 would permit the action to continue, and in *Metropolitan Life Insurance Company v. Dumpson*, (DC SD NY 1961) 194 F Supp 9 the court noted that after dismissal the Commissioner could proceed under a seizure warrant against the policy proceeds and bar the claim of the absent claimant.

15. This is apparently the position in the Southern District of New York. *Kuerschner and Rauchwarenfabrik v. New York Trust Co.*, (DC SD NY 1954) 126 F Supp 684 at 689 (dictum; proceedings under Rule 22(1) FRCP); *Cordner v. Metropolitan Life Insurance Company*, (DC SD NY 1964) 234 F Supp 765 at 767 (dictum); *Aetna Life Ins. Co. v. DuRoure*, (DC SD NY 1954) 123 F Supp 736 at 739-740. Cf *Agricultural Ins. Co. v. The Lido of Worcester*, (DC Mass 1945) 63 F Supp 799 at 801 ("Process may run at least throughout all the states").

Thus, as to foreign claimants process can issue but cannot be served, and interpleader must be denied and the action must be dismissed if there is a single nonresident claimant.[16] This position is not responsive to the *Dunlevy* problem and makes the availability of interpleader depend on the accident of national residence, however clear the nonresident's "contacts" with the forum.

Respondents read the statute too narrowly, and contend for a construction which would substantially impair the remedy Congress sought to create. The scope of § 2361 should be determined from its terms. While it does not provide a mode of service upon persons outside the United States, its provision that process may issue for *all* claimants unquestionably grants jurisdiction to issue process running to all such persons, wherever they are. Consequently, any requirement that foreign service be expressly or impliedly[17] authorized by statute is satisfied,[18] and since § 2361 contains "no

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16. Since 1948, "adverse claimants" in actions under § 1335 have included noncitizens by express reference to the amended definition of diverse citizenship in § 1332.

17. Foreign service under "long arm" statutes not providing for it was sustained in *United States v. Montreal Trust Company*, (DC SD NY 1964) 35 FRD 216 and *Magnaflux Corporation v. Foerster*, (DC ND Ill 1963) 223 F Supp 552. Professor Moore says:

> "* * * decisions have permitted service to be made in foreign countries even where such statutes and rules of court do not specifically mention service outside the United States, so long as their language does not preclude the possibility of such service." 2 Moore's Federal Practice (2d Ed 1966) 1297 (¶ 4.45)

18. No such requirement is contained in the rule and to imply one seems clearly opposed to this Court's view of Rule 4 as stated in *Mississippi Pub. Corp. v. Murphree*, (1946) 326 US 438 at 444-446. See also *Hanna v. Plumer*, (1965) 380 US 460 at 471-472. The Advisory Committee, however, suggests that statutory authority is necessary. Advisory Committee Notes, 28 USC FRCP (1966 Supp) at 73.

provision * * * prescribing the manner of service" on foreign claimants, the means of serving such process on claimants who are outside the United States is found in Rule 4(e) and (i). A clearer example of the proper operation of that rule could scarcely be stated.

2. No constitutional objection to service under Rule 4(i) has been asserted by respondents, nor do the facts of this case present any question of Fifth Amendment limitations on the exercise of federal jurisdiction over nonresidents.[19] The Canadian claimants were in the United States at the time of the accident and will have to return to the United States if they wish to proceed against Clark or his insurer. The interest of the United States in protecting its citizens through the availability of statutory interpleader is real and is responsive to insistent problems. The Canadian claimants have been given actual and reasonable notice of the proceeding and an opportunity to be heard;[20] the circumstances of the case do not visit unusual hardship on them, and it is not offensive to "traditional notions of fair play and substantial justice"[21] that their claims against the policy proceeds should be included in the action with those

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19. See *First Flight Company v. National Carloading Corporation*, (DC ED Tenn 1962) 209 F Supp 730 at 738; Green: *Federal Jurisdiction of Corporations*, 14 Vand L Rev 967 at 981 (1961).

20. *Mullane v. Central Hanover Tr. Co.*, (1950) 339 US 306 at 313-314.

21. *Internat. Shoe Co. v. Washington*, (1945) 326 US 310 at 320.

of the American claimants whose claims are unquestionably before the district court.

Service under Rule 4(i) effectively brought the Canadian claimants before the court.

II.

The injunction should not be limited to restraining execution on the policy proceeds.

Respondents' remaining contention is far removed from the question of subject-matter jurisdiction which is the principal question before the Court. Tacitly admitting the district court's jurisdictions, they seek to limit the interpleader injunction to protect only the deposited fund from execution, allowing the personal injury actions against the insured to proceed elsewhere. *Travelers Indemnity Company v. Greyhound Lines, Inc.*, (DC WD La 1966) 260 F Supp 530. Petitioners have previously pointed out (Pet Br 38-42) that such procedure would guarantee multiple litigation and reduce the benefits of interpleader jurisdiction. Its practical consequences should be clearly understood.

1. The suggested procedure will not only eliminate much of the benefit of interpleader by preserving the multiple litigation which respondents find so attractive; it will, in addition, unnecessarily delay payment of compensation to any of the claimants. Distribution

of the fund to any claimant will wait upon the necessities of the slowest state docket and the last claim to be tried. If the personal injury cases are handled separately in many state courts while the insurance fund, which in most cases is the only source of compensation, lies dormant in the registry of the district court, the problems of settlement will be enormously increased. Nor will the essentially adverse interests of the claimants to the fund be reflected at the trials in evidence or contentions by which each seeks to reduce the claims of the others. No one will benefit from such a bob-tailed remedy, and this includes the claimants.

2. The importance of consolidating the trials of the personal injury claims must be emphasized. Interpleader should be regarded as a desirable and necessary jurisdiction in mass tort cases to protect all of the parties and the courts, and it should not be given a narrow or unfriendly construction. The reality of the situation is that the insurer is necessarily involved up to the policy limits and can reduce its heavy litigation expense, in the absence of interpleader, only by settling claims on an individual and non-prorated basis, leaving most of the claimants without any relief at all. This is one of the principal benefits of interpleader to the insurer, who is the only party which can invoke the Act. If interpleader will not permit at least a measure of consolidation of the personal injury claims, the remedy

will have lost a substantial part of its utility. Except in cases where circumstances create a substantial risk of multiple liability, a limited injunction offers the insurer little but a further increase in its already-heavy litigation costs. We suggest that consolidation of the claims is a desirable objective, and that the Court should not recognize interpleader jurisdiction as sound judicial policy and, in the same breath, build fences around it which limit its usefulness.

CONCLUSION

The question of subject-matter jurisdiction which brought this case into the Court has achieved truly insubstantial proportions. Nobody wants to talk about it except petitioners. Respondents have made no serious effort to support the "direct action" analysis of the court below and are primarily interested in creating limitations upon this desirable and necessary federal jurisdiction which will destroy it. If the Court should decide to go beyond the jurisdictional holding necessary to dispose of the case and discuss the trial procedures to be followed in other situations, it should conclude that respondents' suggestions are without merit and should not be adopted.

It is clear that respondents' appeal to the court below based on the alleged lack of jurisdiction over the Canadian defendants was insubstantial, and it has

gained nothing in this Court. We do not presume to say whether the Court should remand the case for determination of the issue or decide it at this point; it is sufficient that it does not provide a basis for affirming the decision of the court below. That judgment should be reversed.

Problems arising from mass torts are not easily solved. Yet they are serious, and the feeling is strong that there must be a better way to handle them than the unfair, unwieldly, ineffective and costly techniques which have customarily been used. They require solutions extending over state lines, and this necessarily means solutions in the federal courts, which alone have the necessary procedures and jurisdiction to join claims and dispose of them, together with the assets available to satisfy them, fairly. This Court should welcome interpleader jurisdiction and make it an available and effective remedy in such cases.

Respectfully submitted,

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February 8, 1967